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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses	))))	GN Docket No. 96-113

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To: The Commission

COMMENTS

BROADCAST DATA CORPORATION

CHICAGO MDS COMPANY

DCT COMMUNICATIONS, INC.

INDIANAPOLIS MDS COMPANY

LAKELAND BDC-MMDS COMPANY

MILWAUKEE MDS COMPANY

MINNEAPOLIS MDS COMPANY

MULTIPOINT INFORMATION SYSTEMS, INC.

ORLANDO BDC-MMDS COMPANY

PHOENIX MDS COMPANY

PRIVATE NETWORKS, INC.

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SUMMARY

The Joint Commenters, all of whom are small businesses licensed by the Commission to provide Multipoint Distribution Service ("MDS"), submit these Comments in response to the Commission's Notice of Inquiry in the proceeding implementing Section 257 of the Communications Act of 1934, as amended. The Joint Commenters recommend several specific rule and policy changes for the benefit of small MDS businesses, including:

- repeal or modification of certain provisions of Section 21.44 and Section 21.912 of the Commission's rule, which unfairly impose a "death penalty" on MDS licensees;

- guaranteed access to wireless cable video service providers' sites, at fair rates, for transmission equipment of MDS channel licensees;

- establishment of a must-carry policy in circumstances where an MDS licensee and one or more multi-channel video service providers fail to agree on the terms under which the latter will have access to the MDS licensee's capacity.

Adoption of these changes would serve to reduce or eliminate obstacles to the development and expansion of competitive services offered by small businesses holding MDS licenses, and would acknowledge that small MDS licensees provide unique and important niche services in the public interest.

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To: The Commission

COMMENTS

Broadcast Data Corporation, Chicago MDS Company, DCT Communications, Inc., Indianapolis MDS Company, Lakeland BDC-MMDS Company, Milwaukee MDS Company, Minneapolis MDS Company, Multipoint Information Systems, Inc., Orlando BDC-MMDS Company, Phoenix MDS Company, and Private Networks, Inc. (collectively, the "Joint Commenters"), by their undersigned attorney and pursuant to Section 1.415(a) of the Commission's Rules and the Commission's Order, DA 96-1100, released July 9, 1996, hereby submit their comments in response to the Notice of Inquiry (the "NOI") in the Commission's above-captioned proceeding implementing Section 257 of the Communications Act of 1934, as amended (the "Act"). The following is respectfully shown:

I. Preliminary Statement

1. Section 257 of the Act,[1/] enacted as part of the Telecommunications Act of 1996,[2/] requires the Commission to complete a proceeding by July 1997 "for the purpose of identifying and eliminating market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services."[3/] Further, the Commission must "promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity."[4/]

2. Each Joint Commenter is authorized by the Commission to provide a variety of wireless point-to-multipoint microwave radio telecommunications services using channels allocated to the Multipoint Distribution Service ("MDS") under Part 21 of the Commission's Rules.[5/]

1/ 47 U.S.C. § 257.

2/ Pub. L. No. 104-104 110 Stat. 56 (1996).

3/ 47 U.S.C. § 257(a).

4/ 47 U.S.C. § 257(b).

5/ 47 C.F.R. § 21.900 et seq.

3. All of the Joint Commenters are "small" by virtually any definition utilized by the Commission. Each Joint Commenter holds an interest generally in only a single 6 MHz MDS channel in its respective markets, and, in certain markets, in a four-channel MMDS license. By contrast, larger wireless cable[6/] entities that utilize MDS channels in their systems typically have aggregated a substantial number of the 13 total MDS channels that are generally available for licensing in any given market, along with lease rights for capacity on the 20 Instructional Television Fixed Service channels that also are generally available in each market.[7/] Thus, in terms of spectrum capacity, the Joint Commenters clearly are "small" compared to multi-channel video service providers within the wireless cable industry. Moreover, the gross revenues and total assets of each Joint Commenter fall well below the levels established by the Commission when it defined "small business" for purposes of the auction of MDS channel rights completed earlier this year.[8/] In addition to being small businesses,

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6/ Wireless cable, like traditional cable television, is a multichannel video distribution medium that delivers programming to subscribers, but uses microwave channels rather than coaxial cable.

7/ See 47 C.F.R. § 21.901(b).

8/ An entity that, including its affiliates, has annual average gross revenues for the previous three years of not more than $40 million qualifies as a "small business" for MDS. 47 C.F.R. § 21.961(b).

certain of the Joint Commenters also have substantial female and minority participation.[9/]

4. As set forth below, the Joint Commenters recommend several specific rule and policy changes for the benefit of small MDS businesses, including:

- repeal or modification of certain provisions of Section 21.44 and Section 21.912 of the Commission's rule, which unfairly impose a "death penalty" on MDS licensees;

- guaranteed access to wireless cable video service providers' sites, at fair rates, for transmission equipment of MDS channel licensees;

- establishment of a must-carry policy in circumstances where an MDS licensee and one or more multi-channel video service providers fail to agree on the terms under which the latter will have access to the MDS licensee's capacity.

Adoption of these changes would serve to reduce or eliminate obstacles to the development and expansion of competitive services offered by small businesses holding MDS licenses, and would acknowledge that small MDS licensees provide unique and important niche services.

9/ Private Networks, Inc. is minority-owned and controlled. A majority of the stock of DCT Communications is controlled by women. Both Broadcast Data Corporation and Multipoint Information Services have female officers, and fifty percent of the boards of directors of Broadcast Data Corporation and Multipoint Information Services are female.

II. Congress Intended All Small Businesses to Benefit from Section 257

5. The NOI recites a number of measures that the Commission has adopted for the benefit of small businesses engaged in providing telecommunications services. Many of these measures have been intended to induce small businesses to participate in spectrum auctions;[10/] far fewer meaningfully assist existing small business Commission licensees who provide the same services for which the Commission has determined to issue new licenses by auction.[11/] Put another way, the Commission's policies have not aided or encouraged -- and, in fact, may have unwittingly jeopardized -- small business licensees who obtained their licenses in the pre-auction era, notwithstanding that such licensees (including the Joint Commenters) have made substantial investments of time, effort, and money to construct and operate their facilities.

6. The Joint Commenters understand that the Commission's emphasis to date has been directed, at least in part, by Congress.[12/] The significance of Section 257, however, is that the Commission now has a clear mandate to

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10/ See NOI at paras. 10-16.

11/ One exception is minority ownership of mass media outlets. See NOI at paras. 19-20, 22.

12/ See, e.g., 47 U.S.C. § 309(j) and corresponding legislative history at H.R. Rep. No. 111, 103rd Cong., 1st Sess. 254 (1993).

assist small businesses outside of the auction context. Notably, Section 257 does not distinguish between auction winners and non-auction winners, or between existing and future licensees. Rather, Section 257 stands as a complement to Section 309(j) of the Act, which requires the Commission to ensure that small businesses, minorities and women have an opportunity to participate in providing services that are subject to auction. Consequently, in implementing Section 257 of the Act, the Commission must strive to eliminate barriers for **all** small businesses.

III. Adopting Measures to Protect Incumbent Small Businesses Benefits Competition

7. As noted, at this time, the particular concern of the Joint Commenters is the barriers that face small businesses in the provision of wireless cable and other MDS services. The NOI asks if "there are unique obstacles that small businesses face in entering, providing service, or expanding in the telecommunications field that are not faced by small businesses in other sectors...."[13] While the particular circumstances of each Joint Commenter may differ, in general all face similar obstacles in continuing to provide MDS service or expanding their operations to serve additional customers and markets.

13/ NOI, para. 25 (emphasis added).

8. One obstacle to small MDS licensees is posed by provisions in the Commission's rules that incent anti-competitive behavior by larger companies. For example, Section 21.44 of the Commission's rules states:

> A license shall be automatically forfeited in whole or in part without further notice to the licensee upon ... the voluntary removal or alteration of the facilities, so as to render the station not operational for a period of 30 days or more.[14/]

As shown below, this rule has particularly harsh consequences for incumbent[15/] small businesses, and should be modified or eliminated.

9. Section 21.912 of the rules has even harsher consequences that typically fall only on small single-channel MDS licensees. Under this rule, when locally-produced programming that is carried on an MDS channel (and not otherwise shown on broadcast television) leased by a cable operator "is subsequently discontinued", the MDS license is automatically forfeited **the next day**.[16/]

10. These rules provide little or no time for the MDS licensee to obtain a new customer, nor do they take into account the circumstances under which the discontinuance of

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14/ 47 C.F.R. § 21.44(a)(3).

15/ The Commission's rules define an "incumbent" as "[a]n MDS station that was authorized or proposed before September 15, 1995, including those stations that are subsequently modified, renewed, or reinstated." 47 C.F.R. § 21.2.

16/ 47 C.F.R. § 21.912(d).

operation may have occurred -- including termination of a channel lease between an MDS licensee and a wireless cable operator.

11. Unfortunately, the Commission's rules give wireless cable operators incentive and opportunity to force small incumbent MDS licensees out of business -- particularly when viewed in the context of other rights enjoyed by wireless cable operators. The Commission recently completed its first auction of MDS licenses, and is in the process of issuing a single MDS license for each of 493 Basic Trading Areas ("BTA"). Among the rights held by new BTA licensees is the right to provide wireless cable service on any "usable" MDS channels within the BTA.[17/] More significantly, BTA licensees have the right to provide service to the protected service area of any incumbent MDS licensee's channel that becomes available as a result of the incumbent forfeiting the license[18/] -- including a forfeiture pursuant to Section 21.44(a)(3) or Section 21.912(d) of the rules.

12. Wireless cable system operators have aggregated the rights to a substantial amount of MDS spectrum --

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17/ See 47 C.F.R. §§ 21.923-21.925.

18/ 47 C.F.R. § 21.932(a). The rule states that if an incumbent MDS license is forfeited, the incumbent's protected service area "shall dissolve and ... become part of the BTA or PSA surrounding it." 47 C.F.R. § 21.932(a).

including lease or ownership rights to many or all MDS channels in a given market -- and in many instances also have acquired the auctioned BTA MDS license for their existing service area. If an existing channel lease agreement between a small business incumbent MDS licensee and a wireless cable operator/BTA licensee expires, and the incumbent licensee fails to find a new customer within 30 days, or is forced to suspend service for more than 30 days, Section 21.44 and Section 21.912 require that the license be forfeited to the very entity with whom the incumbent MDS licensee has been forced to negotiate. The wireless cable operator plainly has every incentive to refuse to timely negotiate in good faith, thereby forcing the incumbent MDS licensee out of business.[19/]

13. Incumbent MDS licensees -- particularly those with single channels, who are almost exclusively small businesses -- already operate at the mercy of large wireless cable system operators. Single-channel MDS licensees face pressure to co-locate their stations with the facilities of the wireless cable operator/BTA authorization holder. When existing channel lease agreements come up for renewal, the

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19/ For example, a typical channel lease arrangement provides for a lease term of five years, with automatic five-year renewal terms at the option of the lessor-wireless cable operator. At renewal time the wireless cable operator has no incentive to renew, knowing that by choosing not to renew it can cause the termination of the MDS license.

incumbent licensee has virtually no choice but to do business with the wireless cable operator/BTA licensee. The alternatives -- operating independently at the same location (assuming any transmitter, antenna, and tower space is available[20]), or locating transmission facilities elsewhere -- can create severe financial hardship,[21] potential loss of ability to serve the needs of end users (including residential and business subscribers), and potential interference concerns.

14. In sum, the Commission's existing rules have the unintended but foreseeable consequence of harming small businesses. Sections 21.44 and 21.912 impose the "death penalty" on a licensee who has made a substantial continuing investment in a station, but loses a customer or is unable to renew a lease, without regard to the fact that the station is operational and the licensee remains ready to provide service.[22]

20/ Even if space is generally available, the owner -- possibly a wireless cable operator -- may not agree to make it available for anti-competitive reasons.

21/ The wireless cable system operator typically has more favorable lease terms than can be obtained by a single-channel licensee, or may have built its own facilities; consequently, a single channel MDS licensee is likely to face substantially higher site lease payments if it becomes a tenant of the BTA licensee or wireless cable operator, or is unable to co-locate its facilities with the wireless cable system facilities.

22/ The Joint Commenters do not dispute a BTA licensee's right to all available channels in the BTA, which is (continued...)

15. Incumbent MDS small businesses are an important segment of the data-, audio- and video-delivery industry. They offer an outlet for locally-produced, locally-oriented television programming, including news, entertainment, ethnic, and religious programming, that may not be available from cable television or wireless cable systems. In contrast, large wireless cable system operators, serving substantial areas of the U.S.,[23/] own exclusive distribution systems that do not emphasize local programming (other than the mandated set-aside of time for ITFS educational licensees who lease their capacity to the operators). Incumbent MDS licensees also offer a source for high-speed access to the Internet, particularly to businesses to whom multi-channel video providers generally have not provided any service.

22/(...continued)
not inconsistent with the Commission's rules. However, the rules unintentionally give BTA licensees incentive to gain a monopoly on all channels. This result harms small businesses and is not in the public interest.

23/ For example, the service areas of CAI Wireless Systems' (in which Bell Atlantic/NYNEX have a substantial interest) extend along the East Coast of the U.S. from New England to Virginia; Pacific Bell Video Services holds or is completing the acquisition of rights to most of the wireless cable channels in the major metropolitan markets in California, and in many smaller markets as well. Local or national content providers who are unaffiliated with wireless cable operators have no means to access a comparable number of wireless cable subscribers in these markets.

16. A policy promoting the ability of incumbent small business MDS licensees to compete in the delivery of data, audio, and video to businesses and residences is in the public interest. Consequently, the Joint Commenters urge the Commission to implement measures that will guarantee small incumbent MDS licensees site access, and guarantee transmission to and reception by residential and business users, thereby overcoming "obstacles ... in providing service or expanding within the telecommunications industry."[24/] Specifically, the Commission should:

- Modify Sections 21.44(a)(3) and Section 21.912(d) of the Commission's rules to allow incumbent MDS licensees up to one year to begin providing new service or to contract with a new customer,[25/] and/or eliminate entirely the forfeiture provisions in these rules.

- Guarantee access to wireless cable video service providers' sites, at fair rates, for transmission equipment of MDS channel licensees; or, alternatively, permit the co-location of small business transmission facilities, comparable to co-location and access to premises requirements adopted for competitive long distance carriers.

- Require wireless cable system operators, upon expiration of a lease agreement between the operator and an incumbent MDS

24/ NOI, para. 4.

25/ This is not an unreasonable period of time in light of the fact that the licensee will have to locate new content providers/customers, negotiate new leases and contracts, reengineer its system and relocate equipment. Notably, the rules allow a comparable period of time for new station authorization holders to undertake comparable measures.

licensee or failure by such parties to reach a mutually acceptable lease agreement, to make available a portion of their system capacity, with a guarantee of fair and reasonable channel position, for programming/content carried by incumbent small business MDS licensees.[26/]

17. These proposals are consistent with federal schemes implementing Congress's determination that networks should be open to competitors.[27/] Implementing these proposed measures will serve the public interest by promoting the ability of incumbents to compete with large companies providing wireless cable service and by encouraging large wireless cable system operators to negotiate fairly with small business incumbents. These measures could allow incumbent licensees to make available their capacity to outside content providers who are unable to gain access to the wireless cable systems, thereby offering diverse service options as an alternative to

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26/ Such a measure would be consistent with the Commission's rules requiring cable systems to provide access channels and sell time to independent programmers and content providers, and with requirements for open video systems in certain circumstances under Section 653 of the Act. See CS Docket No. 96-46, Implementation of Section 302 of the Telecommunications Act of 1996, Second Report and Order, FCC 96-249, released June 3, 1996, at paras. 99, 157-170.

27/ E.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, releaesd August 8, 1996; Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Transmitting Utilities, 61 Fed.Reg. 21540 (1996).

monopolistic programming of wireless cable systems. Ultimately, these benefits will enable small business entities, including incumbent MDS licensees, to grow and expand their businesses, furthering the goals of Section 257 of the Act.

IV. Conclusion

WHEREFORE, the foregoing premises duly considered, the Joint Commenters respectfully request that the Commission fulfill its obligations under Section 257 of the Act consistent with the foregoing.

Respectfully submitted,

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